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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

AND

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR PETITIONER.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	6
Argument	10
A. Congressional Silence Is Not Controlling on the Existence of Charging Parties' Appellate Rights Under Section 10(l)	11
B. The Scheme of the National Labor Relations Act Demonstrates Congress' Purpose to Accord Charging Parties, in Cases Under Section 10(l), the Status of "Parties" in the District Court, With the Attendant Right to Independent Judicial Review of Adverse or Prejudicial District Court Decisions	15
(1) Protection of the Rights of Charging Parties Is Central to the Scheme of the Act	17
(2) Analysis of the Statutory Language Evidences a Congressional Intent to Accord Charging Parties the Status of "Parties" in Litigation Arising Under Section 10(l)	22
(a) Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act	23

(b) Charging Parties' Status in Proceedings Under Section 10(l) is Analogous to Their Status in Administrative Proceedings Before the Agency in Which They Are Deemed "Parties" and Are Accorded the Right of Appellate Review 25

(3) Congressional Intent as Revealed by the Legislative History of Section 10(l) 27

(4) The Norris-LaGuardia Act Is Irrelevant to the Exercise of Appellate Rights Under Section 10(l) 31

C. The Demands of Due Process of Law Require Granting Charging Parties the Right to Judicial Review in Cases Arising Under Section 10(l) 43

Conclusion 48

AUTHORITIES CITED.

Cases.

Albrecht v. N. L. R. B., 181 F. 2d 652 (CA 7, 1950) ... 18

American Power Co. v. S. E. C., 329 U. S. 90, 107-108.. 43

Ashbacker v. F. C. C., 326 U. S. 327..... 45

Carter v. Kubler, 320 U. S. 243, 247..... 43

Consolidated Edison Company v. N. L. R. B., 305 U. S. 197 .....13, 14

Douglas v. California, 372 U. S. 353 44

Gleeson v. Carr, 219 F. 2d 64, 67 (CA 9, 1955), cert. den. 350 U. S. 827 (1955)..... 47

Greene v. McElroy, 360 U. S. 474, 507-508..... 43

Griffin v. Illinois, 351 U. S. 12..... 44

Henderson v. International Union of Operating Engineers Local 701 (No. 24285, CA 9, decided December 11, 1969) 41

Hourihan v. N. L. R. B., 201 F. 2d 187 (CA, DC, 1952), cert. den. 354 U. S. 930..... 25

Houston Insulation Contractors Association v. N. L. R. B., 339 F. 2d 868 (CA 5, 1964)..... 43

In re Keystone Realty Holding Co., 117 F. 2d 1003, 1005 (CA 3, 1941)..... 47

International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Company, 325 U. S. 335..... 45

Japanese Immigrant Case, 189 U. S. 86, 101..... 43

Keifer & Keifer v. R. F. C., 306 U. S. 381 16

Lane v. Brown, 372 U. S. 477..... 44

Leeds and Northrup v. N. L. R. B., 357 F. 2d 627 (CA 3, 1966)..... 35

Marbury v. Madison, 1 Cranch (5 U. S.) 137..9, 31, 32, 38, 46

McKenna v. Pan Am. Petroleum Corp., 303 F. 2d 778 (CA 5, 1962)..... 47

McLeod v. Business Machine & Office App. Mech. Conf. Board, 300 F. 2d 237 (CA 2, 1962) 39

N. L. R. B. v. Acme Industrial Company, 385 U. S. 432 47

Piasecki Aircraft Corp. v. N. L. R. B., 280 F. 2d 575 (CA 3, 1960) 25

Retail Clerks Union, Local 137, et al. v. Food Employers Council Inc., 351 F. 2d 525 (CA 9, 1965) .....
.....8, 22, 27, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43

Roberts v. N. L. R. B., 350 F. 2d 427 (CA DC, 1965).. 12

Rogers v. Consolidated Rock Prods. Co., 114 F. 2d 108, 110 (CA 9, 1940), aff'd on other grounds 312 U. S. 512 U. S. (1940) 47

San Francisco Oakland Newspaper Guild v. Kennedy, (unreported order of May 20, 1969) 41
Sripps-Howard Radio, Inc. v. F. C. C., 316 U. S. 4 .....7, 11, 12
Shields v. Utah Idaho Central R. Co., 305 U. S. 177, 182 43
Smartt v. Coca Cola Bottling Corp., 337 F. 2d 950 (CA 6, 1964), cert den. 380 U. S. 934 47
St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 84 ... 45
Tatum v. Cardillo, 11 F. R. D. 585 (S. D. N. Y.) 12
United Automobile Workers v. Scofield (Fafnir Bearing Co.), 382 U. S. 250 .....6, 7, 13, 14, 18, 19, 20, 22, 41, 43, 44, 47
United Steelworkers v. N. L. R. B., 376 U. S. 492 45
Vaca v. Sipes, 385 U. S. 895 12
Wolpe v. Poretsky, 144 F. 2d 505 (CA 4, 1944), cert. den. 323 U. S. 777 47
Wong Yang Sung v. McGrath, 339 U. S. 33, 49 43
Young v. Higbee Co., 324 U. S. 204, 210 47

Statutes and Miscellaneous.

National Labor Relations Act, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.* 2
Section 3(d) 25
Section 8(b)(4) 10
Section 8(b) (4) (i) (ii) (B) 3
Section 8(b)(7) 10
Section 10(b) 13, 17
Section 10(f) 13, 14, 18, 38, 39
Section 10(h) 8, 30, 31, 37, 39
Section 10(j) 23, 24

Section 10(l) 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 43, 44, 46, 47

Norris-LaGuardia Act, 29 U. S. C. A. § 107.....
3, 5, 10, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

Hobbs Act, Sec. 8, U. S. C. § 1038 21

Judicial Review Act, 5 U. S. C. §§ 103-42 21

Chandler Act, S. 206, 11 U. S. C. § 606 46

Legislative History of the National Labor Relations Act, 1947 (G. P. O. 1948).....28, 29

National Labor Relations Board's Rules and Regulations

Section 101.10 25
Section 102.8 .....17, 25
Section 102.38 25
Section 102.46(a) 17
Section 102.48(d) 18

4 Moore Federal Practice 104 (2nd Ed., 1963) 9, 46

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Tenth Circuit Court of Appeals dismissing petitioner's appeal (App. p. 124), is reported at 410 F. 2d 1148, 71 LRRM 2251. An official transcript of the unreported decision of the District Court refusing to grant injunctive relief under Section 10(l) on the basis that no violation of law had occurred, from which decision petitioner sought to appeal, is found at App., p. 22; the subsequent decisions of the National Labor Relations Board and its Trial Examiner, reported at 176 NLRB No. 120, finding that the charged violations of law had in fact occurred are found at App., pp. 130 and 180 respectively.

JURISDICTION.

The opinion and judgment of the Court of Appeals dismissing petitioner's appeal were filed and entered on May 15, 1969.

An order was entered by Mr. Justice Black on August 13, 1969, extending the time for filing a petition for writ of certiorari.

The petition for writ of certiorari was filed on August 15, 1969 and was granted on November 17, 1969.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioner's appeal is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* are set forth in the Appendix at pp. 142-147.

QUESTION PRESENTED.

Where a charging party before the National Labor Relations Board has filed charges alleging it was aggrieved by a union's unlawful picketing, which charges, if they have reasonable basis in fact and law, require the Board's Regional Director to seek injunctive relief, and where the Regional Director does find reasonable cause to believe a violation of law was committed and seeks such injunctive relief, may the aggrieved charging party appeal the District Court's refusal to grant such injunctive relief when the Board's Regional Director is unwilling to do so?

A resolution of this question depends, in turn, upon a resolution of the following issues, among others, which it encompasses:

(1) Does the denial to charging parties of the right to judicial review of cases in which they are conferred express rights in lower courts infringe due process of law?

(2) Does an appeal constitute a new cause or only a continuation of the same cause litigated below?

(3) Does the Norris-LaGuardia Act bar aggrieved charging parties from an appeal in an injunction suit of which a court has already, and properly, taken jurisdiction?

(4) Does Congress' silence on the question of charging parties' appellate rights under Section 10(l) require the conclusion that Congress intended to deny them the right to appeal adverse district court decisions when the Board refuses to appeal?

(5) Are the private rights which the Act recognizes enforceable only in situations in which final Board orders issue, or do they exist as well in proceedings under Section 10(l) for interlocutory relief?

(6) Does the scheme of the National Labor Relations Act demonstrate Congress' purpose to accord charging parties the status of party-litigants in proceedings under Section 10(l), with an attendant right independently to seek appellate review of adverse district court decisions?

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioner herein, alleging that Respondent union had engaged in enumerated unfair labor practices within the meaning of Sec. 8(b)(4)(i)(ii)B of the Act, 29 U. S. C. § 158(b)(4)(i)(ii)B, which proscribes secondary boycotts by unions. After conducting a preliminary investigation of the charges, as required by Sec. 10(l), Respondent Clyde F. Waers, Regional Director of the Board,* concluded

* Mr. Waers was succeeded, upon his recent death, by Francis Sperandeo, as reflected in the revised case caption.

that there was reasonable cause to believe that Respondent union was engaging in unfair labor practices, as charged by petitioner and that an unfair labor practice complaint should issue. Thereupon, pursuant to Sec. 10(l), Waers filed a petition in the District Court seeking a temporary injunction against the union's unlawful picketing of petitioner's premises (App., p. 3). A hearing on an order to show cause was held during which the petitioner and Respondents participated, as provided in Sec. 10(l). (App., p. 13). After presentation of evidence the District Court dismissed the petition for temporary injunctive relief on the grounds that the evidence failed to establish a violation of law and that there was "little probability" that the Board would grant the requested relief when the matter was heard on the merits in formal agency proceedings. (App., p. 22, p. 28).

Although Respondent Waers persisted in his belief that the union had committed the charged unfair labor practices, as evidenced by the fact that, on behalf of the Board, he continued in the prosecution at the agency level of the complaint issued against the union (App., p. 15), he refused to appeal the district court's denial of injunctive relief. Throughout this period the union continued to picket petitioner's premises. Faced with the union's continuing picketing, with the Board's refusal to appeal, and with the prospect of many months of litigation before the Board, petitioner itself sought to appeal the district court's adverse decision in order to secure the relief from an unlawful boycott which Section 10(l) was designed to afford. (App., pp. 30-31).

On February 6, 1969, subsequent to the filing of the appeal but prior to oral argument, a Trial Examiner of the Board issued a Decision on the merits of petitioner's charges, following a formal evidentiary hearing, in which

he found that the Respondent union had in fact committed the unfair labor practices charged. (App., p. 80).

In its decision of May 15, 1969, the Court of Appeals dismissed petitioner's appeal, holding that petitioners lacked standing to appeal for two reasons; first, since Section 10(l) did not expressly grant that right, therefore Congress did not intend its existence; and second, the Norris-LaGuardia Act, 29 U. S. C. A. § 107, which limits courts' jurisdiction to grant injunctive relief, bars such an appeal by any party except the Board. (App., p. 124). The Court of Appeals did not reach the merits of the District Court's decision, the case having been argued principally on Respondents' motions to dismiss the appeal for lack of standing. (App., pp. 36-80).

On June 20, 1969, the Board rendered its Decision and Order on the merits of the underlying dispute, in which it affirmed the Trial Examiner's finding that Respondent union had engaged in the illegal conduct charged by petitioner and alleged by the Regional Director in his suit for injunctive relief. (App., p. 130).

It was only after the issuance of the Board's Decision that the union ceased, at least temporarily, its unlawful picketing. The union's petition for review of the Board's Decision is currently pending in the Court of Appeals for the District of Columbia Circuit. (App., p. 135). The Board has filed a cross-petition for enforcement of its order. (App., p. 139). Sears, petitioner herein, filed a motion to intervene in the enforcement and review proceedings (App., p. 137), which motion was granted by the court (App., p. 141). Oral argument in the District of Columbia Circuit is scheduled for January 22, 1970.

SUMMARY OF ARGUMENT.

This case presents an important question involving the appellate rights of charging parties before the Board in proceedings under Section 10(l) of the National Labor Relations Act. To charging parties the existence of this right may be synonymous with economic survival in the face of an adverse decision in the district court which the Board, as here, refuses to appeal for unstated reasons unrelated to the merits of the dispute. To the orderly development of law the issue is significant as it involves a clarification of the requirements of due process of law and of the intent of Congress in enacting Section 10(l), it requires a resolution of a conflict in the circuits, it permits this Court to offer needed guidance to divided courts in the correct application of the Norris-LaGuardia Act to injunction proceedings under Section 10(l), and it enables this Court to void a decision of the Tenth Circuit which is in conflict with this Court's decision in *United Automobile Workers* v. *Scofield* (*Fafnir Bearing Co.*), 382 U. S. 205.

Petitioner Sears contends that their interest in proceedings under Section 10(l) of the Act are such that under ordinary principles of law and equity and pursuant to the scheme of the Act and the requirements of due process, they woud constitute "parties" to those proceedings: the violation of *their* rights gave rise to charges which *they* filed; *they* sustained substantial and irreparable harm as a consequence of that violation; the Board sought to prevent a recurrence of injury to *their* rights and interests by filing a petition for an injunction; and the preservation of *their* legitimate and essential rights and interests is at stake in the outcome of the litigation instituted by the Board at *their* behest and for *their* benefit. Since no provision of the National Labor Relations Act or any other statute prohibits according them the status of "parties"

in the district court proceedings which result from the charges they filed with the Board or otherwise prohibits their exercise of the right of appellate review, and since, affirmatively, the provisions of the Act and decided judicial authority do accord them rights of participation which are exercised only by "parties", therefore their is no reasonable basis to deny them that status.

(1) Section 10(l) is silent as to the right of a charging party to seek appellate review from an adverse district court decision when the Board's representatives decline to do so. However, this Congressional silence is not controlling on the existence of such a right. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 11, *United Automobile Workers* v. *Scofield (Fafnir), supra.* This is particularly clear with respect to Section 10(l) since courts have regularly recognized a series of rights flowing from that Section which are not expressly granted therein. These include both unstated rights of the charging party to participate in the process of litigation itself as well as rights to seek review of adverse decisions by the Board and by respondents. Under these circumstances the failure of Congress expressly to grant charging parties the right to seek review can have no greater significance than Congress' failure expressly to grant the same right to the other parties to the litigation.

(2) The scheme of the Act constitutes further evidence that Congress intended to accord to charging parties the status of "parties" in proceedings arising under Section 10(l) with the attendant right to seek appellate review. Thus Congress created a specific extraordinary remedy on their behalf in Section 10(l) and throughout the statute made the interests of the charging parties central to all proceeding authorized by the Act. Indeed, charging parties are expressly made "parties" to all such proceedings and

are accorded the right to seek review from all adverse agency decisions. This fact, plus the grant of so specific and extensive rights in Section 10(l) demonstrate Congress' intention that charging parties should both possess and exercise the same rights flowing from the same status as a "party" pursuant Section 10(l) as they possess and exercise with respect to every other proceeding under the Act; the grant of rights exercised only by parties suggests an intention to create the status of "parties". That Congress did so intend is further supported by an analysis of the language of the statute itself, by the fact that the posture of charging parties in cases under Section 10(l) was made analogous to their status elsewhere under the statute where they do function as "parties", and from a review of the legislature history of that Section.

(3) Reliance by the court below on the purported operation of the Norris-LaGuardia Act in order to deny charging parties the right to review in cases under Section 10(l) is misspelled. Norris-LaGuardia constitutes a limitation on private parties' rights to initiate actions for injunctive relief, and not on their efforts to support such suits once they have been properly brought by the Board. *Retail Clerks Union, Local 137* v. *Food Employers Council,* 351 F. 2d 525 (CA 9, 1965). Efforts by charging parties to secure the success of the Board's petition for injunctive relief by appealing the dismissal of that petition are acts in support of the Board; they merely test the correctness of the district court's dismissal and do not constitute the initiation of a suit for an injunction such as only the Board may institute. The court below failed to appreciate or apply the distinction between "initiate" and "support" and failed to evaluate fully the logic or effect either of *Retail Clerks* or of Section 10(h) of the Act which expressly exempts *all* proceedings arising under the various pro-

visions of Section 10 from the operation of Norris-LaGuardia.

(4) The denial to charging parties of the right to seek review of a decision adverse to their interests violates the requirements of due process of law. Due process requires that when rights are conferred then means for the enforcement of those rights should be assumed, if possible. The decision of the court below recognized the rights which Section 10(l) granted to charging parties yet foreclosed their ability to act to enforce them upon the issuance of the district court's decision; thereafter, the continued protection of those rights was made to depend on the whim of the Board to seek appellate review, an election over which the charging parties can exercise no control. Moreover, the view of the court below that the seeking of appellate review constitutes a new and separate action from the cause being reviewed is legally incorrect and Constitutionally proscribed. *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137. Finally, the right to seek appellate review inheres in charging parties under Section 10(l) whether or not they are deemed to constitute "parties" in the district court. The nafure and extent of their participation, as guaranteed by that Section confers upon them at least the status of "statutory intervenors" or "quasi-intervenors" who have the same right of appellate review as do parties. 4 Moore, Federal Practice 104 (2d ed. 1963). Even should this Court conclude that an express motion to intervene is required of charging parties as a prerequisite to seeking review, such a motion was made to and denied by the court below. Under these circumstances that court's dismissal of the petitioner's appeal below on the ground they lacked standing to lodge such an appeal infringed due process.

ARGUMENT.

In section 10(l) of the National Labor Relations Act, under which statutory provisions this case arises, Congress neither authorized nor prohibited appellate review by charging parties of adverse district court decisions. The question presented here for review arises as a consequence of that silence. The decision of the court below dismissing Sear's appeal was expressly premised both on the statute's failure specifically to accord Sears the independent right to seek appellate review as well as on the purported operation of the Norris-LaGuardia Act, 29 U. S. C. A. § 107; absent Congress' silence of course, there would have been no need to evalnate the effect, if any, of Norris-LaGuardia on charging parties' appellate rights in injunction proceedings under Section 10(l).

In general, Section 10(1) constitutes a mandatory direction on the Board's agents to file a petition for injunctive relief in aid of aggrieved charging parties whenever it appears that there is reasonable cause to believe that the latter's charges are true that they have been victimized by certain illegal strikes, picketing or boycotts prohibited by Sections 8(b) (4) and 8(b) (7) of the National Labor Relations Act. Section 10(l) goes on to provide, in relevant part:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party,* shall be given an opportunity to appear by counsel and present relevant testimony . . ." (Emphasis added).

The Section states nothing further with respect to any participants' additional or other rights in the district court

proceedings and it states nothing whatever regarding the right to appellate review of that court's decision by any of those participants,—be they the charging party, the respondent, or the Board's agents themselves.

Sears submits that Congress' silence is not controlling on the existence of such appellate rights; that these rights arise both from the scheme of the National Labor Relations Act, as well as from the requirements of due process; that the Norris-LaGuardia Act does not apply to efforts to review the correctness of decisions rendered in suits already properly lodged in the Federal courts; and that, in general, charging parties enjoy the status of "parties" in proceedings under Section 10(l), possessing all the rights and privileges—such as the right to seek appellate review—attendant to that status.

A. CONGRESSIONAL SILENCE IS NOT CONTROLLING ON THE EXISTENCE OF CHARGING PARTIES' APPELLATE RIGHTS UNDER SECTION 10(l).

The court below was in error in drawing the inference that the failure of Congress to make specific provisions for charging parties' appellate rights in Section 10(l) evidenced a Congressional purpose to deny them the exercise of such rights.

In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 11, this Court recognized that the silence of Congress as to the conventional power of an appellate court to stay the enforcement of an administrative order pending the appeal therefrom did not destroy or dilute that power. The controlling assumption, said the Court, is that "Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." And the Court emphasized (p. 11):

> "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress has said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

The lesson of *Scripps-Howard* case has been applied regularly by courts, including this Court, which have found the existence of both substantive and procedural rights in the face of Congress' failure specifically to articulate their existence. For example, in *Tatum* v. *Cardillo,* 11 F. R. D. 585 (S. D. N. Y.), the Court permitted an employer and its insurer to intervene as parties defendant in a suit for review of an order by a deputy commissioner in the Bureau of Employees' Compensation. It made no difference that the statute provided that the action should be brought against the deputy commissioner. "The statute does not provide that the deputy commissioner shall be the *only party* defendant." 11 F. R. D. at 586.

So, too, in *Roberts et al.* v. *National Labor Relations Board,* 350 F. 2d 427 (CA, DC, 1965), Judge Fahy pointed out that the National Labor Relations Act did not contain a provision (similar to the prohibition against employers) making it an unfair labor practice for a union to discriminate against an employee because he has filed charges under the Act. But Judge Fahy added that "We think none was required", reasoning that in light of the necessity to keep open the channels created by Congress for the administration of a public law and policy, "the legislators may have decided it was unnecessary to make specific prohibitions against union interference with the initiation of charges. See also *Vaca* v. *Sipes,* 385 U. S. 895.

Similarly, in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, the issue concerned the right of a union to be made a party in a Labor Board proceeding. The Board urged that "the National Labor Relations Act does not contain any provisions requiring these unions to be made parties; that Section 10(b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged." This Court rejected that contention because: "In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed." 305 U. S. at 233.

A particularly cogent illustration of the proper approach to claims of rights in the face of legislative silence is found in *United Automobile Workers* v. *Scofield (Fafnir Bearing Co.)*, 382 U. S. 205, in which this Court recognized charging parties' right to intervene in the appellate consideration of their cases notwithstanding a total statutory silence on the subject of their right to do so.

Finally, the error of the court below in restricting the exercise of rights in proceedings under Section 10(l) to those expressly enumerated therein is demonstrable from the exercise of logic as well as from unchallenged past practice. Nowhere, either in Section 10(l) or anywhere else in the Act, did Congress authorize appellate review by respondents against whom an injunction had been issued by a district court. While it is true that the exercise of this right is customary in our judicial system, it is also true that in Section 10(f) of the Act, Congress expressly codified its exercise as to respondents against whom final agency orders had been issued. Pursuant to the theory of the court below, therefore, Congress' failure to provide an analogue to

Section 10(f) in cases involving injunction proceedings should indicate its desire that enjoined respondents lack the right of review. Nonetheless, we are aware of no reviewing court which has precluded such respondents from reviewing the order enjoining their challenged conduct. Similarly, pursuant to the theory of the court below that what is unstated was not intended, charging parties in cases under Section 10(l) lack the *right* to cross-examine witnesses, to respond to motions, or to file briefs, as well as to seek appellate review. In view of Congress' specific grant to them of the right "to appear by counsel and present any relevant testimony", this view produces a series of anomalies: Changing parties are accorded the right to elicit evidence they believe to be legally sufficient from their own witnesses but not from the witnesses of other parties to the proceeding; they are accorded the right to present such evidence without the right to respond to opposing motions to dismiss on the ground that the evidence so elicited is not legally sufficient; they have a right to present such factual evidence without a right to submit memoranda or briefs or oral argument establishing or justifying such a legal sufficiency. Accordingly, the view of the court below that the words of Section 10(l) must be literally and exclusively construed creates a burden too heavy for the laws of logic and common sense to support.

In sum, the existence of rights as to which the statute is silent, and particularly the right to appellate review, becomes a function not of specificity of language but of "the statutory design of the Act" and the requirements of due process. *U. A. W.* v. *Scofield, supra; Consolidated Edison* v. *N. L. R. B., supra.*

B. THE SCHEME OF THE NATIONAL LABOR RELATIONS ACT DEMONSTRATES CONGRESS' PURPOSE TO ACCORD CHARGING PARTIES, IN CASES UNDER SECTION 10(l), THE STATUS OF "PARTIES" IN THE DISTRICT COURT, WITH THE ATTENDANT RIGHT TO INDEPENDENT JUDICIAL REVIEW OF ADVERSE OR PREJUDICIAL DISTRICT COURT DECISIONS.

In enacting Section 10(l) of the Labor Management Relations Act, Congress expressed its concern over the potential harm to neutral employers victimized by unlawful secondary boycotts by requiring the Board to seek injunctive relief whenever it had reasonable cause to believe that an employer's charge of the existence of such unlawful boycotts was meritorious. Congress emphasized its belief in the importance of affording such injunctive relief to aggrieved employers by imposing a mandatory duty on the Board, acting through its Regional Director:

> "If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he *shall*, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matters." (Emphasis added.)

Having thus expressed its conviction that aggrieved charging parties are entitled to such relief, it is inconsistent with this Congressional purpose to deny charging parties the right to appeal a district court's erroneous denial of that relief in circumstances where the Board declines to appeal. To attribute to Congress a purpose to deprive charging parties of the right to such an appeal would render the Congressional scheme inconsistent and idiosyncratic: Congress' concern for the welfare of unlawfully boycotted employers gave rise to the existence of an extraordinary

remedy in Section 10(l) on their behalf; the duty to seek it was made obligatory on the Board; in order to assure charging parties the fullest opportunity to obtain the relief to which the violation of their substantive rights entitled them Congress expressly conferred upon them independent participatory rights in the district court proceedings which the Board is required to institute on their behalf.

Under these circumstances, and in the absence of any statutory language or legislative history expressly *prohibiting* charging parties' right to appeal, Congress cannot reasonably be understood to have intended to deny them the right to seek review of an erroneous district court refusal to grant appropriate relief in situations where the Board refuses to do so. Such an assumption requires the conclusion that Congress created a substantive right on behalf of charging parties to an injunction of secondary boycotts, yet afforded them no relief from a violation of that right when the Board, for manpower or budgetary reasons unrelated to the merits of the case declines to appeal an erroneous denial of that relief.[1] Such a construction is inconsistent with the statutory scheme to afford appropriate and prompt relief for the described prohibited conduct and is in conflict with the established principle of this Court to avoid such idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

1. It is true, of course, that charging parties' allegations that they had been victimized by an illegal boycott or strike will ultimately be litigated in formal adversary proceedings. In this sense a "remedy" is afforded notwithstanding the denial of injunctive relief. However, this litigation, first before a Trial Examiner, then on review to the Board, extends over many months. When a continuing boycott or strike does irreparable harm to the employer, as the Board's petition for an injunction as well as the statute's provision for injunctive relief admit, then an appealable final order only after so protracted a period constitutes no remedy at all. A victory before the Board, without earlier temporary injunctive relief, would constitute a pyrrhic victory few employers would survive to enjoy.

Moreover, such a view is inconsistent with the general design of the National Labor Relations Act which recognizes and promotes the interests of charging parties and which renders those interests central to all proceedings authorized in the Act. The statutory concern for the protection of those interests would conflict with a denial of the right to appellate review of adverse decisions rendered at any stage of litigation resulting from an initiation of agency action.

(1) Protection of the Rights of Charging Parties is Central to the Scheme of the Act.

Analysis of the statutory scheme, together with the Board's own rules, reveals clearly that Congress intended charging parties to enjoy the full status as parties, with the attendant right to seek review of adverse decisions, throughout the litigation of cases stemming from their charges with the Board:

(a) In Section 10(b) Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(b) Under the Board's construction of the Act, it has accorded the charging party the status of a full party litigant in proceedings before the Board, without limitation as to the various stages of the proceedings involved;[2]

(c) The charging party is accorded the right to appeal adverse decisions of Trial Examiners to the Board, in Section 102.46(a) of the Board's Rules;

(d) The charging party is accorded the further right to seek, after issuance of the Board's order, a

2. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group "... any person filing a charge or petition under the act, ..."

reopening of the hearing, rehearing, or reconsideration; Section 102.48(d) of the Board's Rules;

(e) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the Charging party, *Albrecht* v. *N. L. R. B.*, 181 F. 2d 652 (CA 7, 1950) and cases there cited.

(f) *The Act recognizes and enforces charging parties' private rights.*

Not only does the Act accord to charging parties the status of full "parties" in all proceedings before the Board, and clothe them with all the procedural safeguards customary to that status including the right to seek review at all levels of those proceedings, as was just demonstrated, but the Act also recognizes that the rights which are thus protected include the charging parties' private or parochial rights and interests. One of the principal holdings in *U. A. W.* v. *Scofield*, *supra*, was precisely the proposition that the Act recognizes and enforces the private rights of aggrieved parties, and not merely generalized "public rights". Thus the right to be free of the effects of an unlawful secondary boycott, while it is a right which the Board enforces in the public interest, is also a private enforceable right of the aggrieved victim of that boycott.

In the instant case, Sears was the target of such an unlawful boycott. When the Board declined to appeal the district court's refusal to enjoin that boycott, Sears' sought to protect its private right to be free of such conduct by seeking review of the district court's decision. The propriety of Sears' action is a product of the legislative scheme; the Act repeatedly and uniformly accords to private parties the right to review all decisions adverse to their

interests at all stages of the agency's deliberations without stated exception, while at the same time recognizing the enforceability of their private interests to be free of the effects of unlawful boycotts. The result of the combination of these two propositions is a demonstrable Congressional intention that private parties should also have access to appellate review of district court decisions similarly adverse to their statutorily recognized private interests. Moreover, it is inconsistent with this statutory scheme or legislative purpose to deny the beneficiary of a statutory right the opportunity to act independently to enforce it through appellate review when the Board refuses to do so.

There would be no point to recognizing the distinction between a private and a public right if the private beneficiary were not accorded a role separate and independent from the Board in securing and protecting it. Nor would there exist any real purpose in drawing that distinction if the private beneficiary were not permitted to seek appellate review in order to obtain the relief to which the statute entitles him and which would otherwise be lost to him because of the Board's refusal to act on his behalf. This is a particularly desirable result where, as here, enforcement of the private right serves the public interest by achieving the cessation of Congressionally prohibited conduct which even the Board considered to be unlawful.

The Board has resisted the idea that charging parties should exercise any such independent role in the protection of their own rights. Thus the Board argued to this Court in its brief in *Scofield* and *Fafnir* that "Congress established the Labor Board as the exclusive agency for enforcing the rights created by the Act," and that the role of the charging party was limited to filing charges, participating in the hearing on those charges and appealing from adverse final Board orders. The Board expressly contended

that charging parties have no *independent* role in the appellate consideration of their cases since the Board had the exclusive authority to determine whether to seek review, or to withdraw a case from the court of appeals, or to decline to seek certiorari from an adverse decision.*

In explicitly rejecting the Board's contentions in *Scofield* and *Fafnir*, and by according charging parties appellate rights which permitted them to exercise powers and discretion which could conflict with the Board in areas which the Board had claimed to be within its exclusive province, this Court laid finally to rest any doubts that the scheme of the Act recognized an independent role for charging parties in the protection of their rights.

In sum, analysis of the legislative scheme reveals an intention to accord party status to charging parties under Section 10(l) and to permit them independently to seek appellate review when the Board refuses, for whatever unstated reasons, to do so. Otherwise the Congressional scheme becomes anomolous and idiosyncratic. Accordingly, since Congress conferred party status upon charging parties at every stage of agency proceedings and in the courts following final agency action, it follows that the same status was conferred in Section 10(l) through the use of the same language to perform the same participating role; there is no reason to believe Congress would have deprived charging parties of such a status *only* in the district court in actions under Section 10(l), but nowhere else in the statute at any level of agency or judicial proceedings. Further, the denial of such party status would import into the Congressional scheme an obviously unintended paradox: should the district court find merit in the Board's petition and grant an injunction, the adjudged wrongdoer has an immediate right to appellate review; should the district court

* Memorandum for the National Labor Relations Board, p. 3, Brief for the National Labor Relations Board, p. 27.

erroneously refuse to grant an injunction, the wronged victim has no such right. Despite the fact that the unremedied violations infringe the charging parties' private rights.

Finally, Congress' intent can be determined by analogy to what it provided in the Judicial Review Act, 5 U. S. C. §§ 103-42.

The latter statute, which purported to import the procedures of the National Labor Relations Act into the schemes of other Federal agences, contains the following relevant provisions in § 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right, and be represented by counsel in any proceeding to review such order. . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or *concontinue said proceeding unaffected by the action or non-action of the Attorney General therein.*" (Emphasis added.)

Since the parties in the agency proceedings (which includes the charging party) are given the right to "continue such proceeding" on appeal "unaffected by the action or non-action" of the agency, it would appear that Congress would similarly favor the continuation of proceedings under Section 10(l) by the charging party despite the inaction of the Board which declined to appeal.

(2) Analysis of the Statutory Language Evidences a Congressional Intent to Accord Charging Parties the Status of "Parties" in Litigation Arising Under Section 10(l).

A reading of Section 10(l) reveals that nothing expressly contained therein is inconsistent with the conclusion that charging parties were intended to function as "parties" in proceedings under that Section. On the contrary, the nature and extent of the rights accorded them is consistent with no lesser status.

Manifestly, the enumerated rights of participation granted charging parties exceed those associated with the status of an *amicus curiae*. An *amicus* is not entitled to participate actively in the development or introduction of evidence, or to raise objections, or to make argument during the course of the litigation; he is limited instead, and only with the Court's permission, to oral argument or the filing of briefs *after* the record is made. However the express and necessarily implied provisions of Section 10(l) permit charging parties without need of the court's permission to be represented by counsel throughout the proceedings, to call and cross-examine witnesses, to offer contentious evidence, to introduce documentary and other relevant matter, to make and respond to oral argument and to file briefs.[3] In exercising these rights the charging parties not only create the record which will govern their destinies in the district court, but they also narrow the issues and shape that record for appellate review.

3. The logical necessity for concluding that these enumerated rights flow from the express grant in Section 10(l) was demonstrated above in the discussion of the fact that Congress' silence is not controlling in the interpretation of this Section. Illustrative of the further fact that courts have interpreted Section 10(l) with the same breadth is *Retail Clerks Union, Local 137* v. *Food Employers Council*, 351 F. 2d 525 (CA 9, 1965), a decision cited approvingly on that issue by this Court in *U. A. W.* v. *Scofield*, *supra*.

Were the statute intended to relegate charging parties to the status of *amici*, then their role would not have been expanded to permit such full and active participation as a matter of right. Similarly, if charging parties were not intended to possess the right to seek appellate review they would hardly have been accorded the right to exercise such control over the nature and posture of a record to be reviewed (or not) at the whim of others.

In short, if Congress had not intended charging parties to function as "parties", then they would not have granted them rights such as only "parties" can exercise.

Further support for the proposition that Congress conferred party status upon charging parties in cases arising under Section 10(l) results from a comparison between the rights granted them in Sections 10(l) and 10(j) of the Act, and by analogy to the effect of similar language appearing in the Board's own rules.

(a) Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act.

Sections 10(j) and 10(l) are alike in that both authorize the Board, acting through its Regional Directors, to institute petitions for injunction when the Regional Director believes that charged unions have engaged in such injurious unfair labor practices as render extraordinary injunctive relief appropriate. The sections differ only in that pursuant to Section 10(j) injunctive relief *may* be sought for any violation of that statute, whereas Section 10(l) provides that such relief *must* be sought for the violation of the specific and particularly injurious unfair labor practices enumerated therein.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition *and* be permitted to appear by counsel *and* present any relevant testimony, Section 10(j) requires only that they be notified of the filing

of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections manifests Congress' intent to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests. Such a guarantee goes beyond the presence of and the representation by the Board, which was deemed adequate to protect charging parties in cases arising under 10(j) but was deemed inadequate for cases under 10(l). Rather, the nature of the additional guarantee afforded by Congress was affirmatively to confer upon charging parties in 10(l) cases the status of "parties".[4]

Indeed, if Congress believed that the judgment and participation of the Board in injunction proceedings under Section 10(l) would suffice fully to protect the charging parties' interests, and that they should have no *independent* role in the participation and prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights upon charging parties in 10(l) cases which were denied to those in 10(j) cases. The adoption of such a view would render meaningless the deliberate statutory distinction between the rights conferred in the two sections. It follows, therefore that Congress intended to accord charging parties in 10(l) cases

4. The difference between the rights accorded to charging parties in the two sections is justifiable on two grounds. First, the nature of the conduct with which Section 10(l) deals, *i.e.*, unlawful strikes and boycotts, inherently involves the greatest potential harm to the aggrieved victims. For this reason Congress also imposed a mandatory duty on the Board to seek injunctive relief in cases arising under that Section whereas in all other cases, such as are dealt with in Section 10(j), the Board is given discretion as to whether to seek such relief.

Second, it would be inconsistent with the discretion accorded the Board in Section 10(j) to confer independent party status on charging parties in the later cases since they might seek to go forward in instances where the Board's discretion dictated otherwise. Clearly, when the Board is required to proceed, as in Section 10(l), no such potential conflict exists.

the independent status of "parties", clothed with the rights of that status, including, therefore, the right to seek appellate review.

(b) Charging Parties' Status in Proceedings Under Section 10(l) Is Analogous to Their Status in Administrative Proceedings Before the Agency in Which They Are Deemed "Parties" and Are Accorded the Right of Appellate Review.

Although their charges initiate the Board's investigation of their cases, charging parties cannot compel the Board to issue a complaint; that right, under Section 3(d) of the Act, is within the exclusive province of the Board's General Counsel. *Hourihan* v. *NLRB*, 201 F. 2d 187 (CA DC, 1952), cert. den. 345 U. S. 930. Neither can the charging parties control what the complaint shall allege nor seek unilaterally to expand its allegations once it is filed. *Piasecki Aircraft Corp.* v. *NLRB*, 280 F. 2d 575 (CA 3, 1960). Nonetheless, once the complaint has been filed, and despite these limitations, charging parties are expressly made full party-litigants in all proceedings before the Board with a right to review any adverse decision in the courts.

In Section 102.8 of the Board's Rules and Regulations, charging parties are accorded the full status of "parties" in all Board proceedings, without limitation.

Section 102.38 of the Board's Rules and Regulations, entitled "Rights of Parties," provides as follows:

> "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, . . ."

Section 101.10, again defining parties' rights in formal hearings, provides that:

> ". . . all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner."

According to the Board's own Rules, therefore, one who is a full "party" before the Board possesses precisely those rights which Section 10(l) confers upon charging parties in the district courts; conversely, full party litigants in Board proceedings are conferred no rights which are denied to charging parties in district court proceedings.

Analogously, charging parties cannot compel the Board to file a petition for an injunction under Section 10(l), nor can they dictate its terms or vary them after it is filed. Yet Congress, in Section 10(l), conferred on charging parties a participatory role and participatory rights which are identical to those which the Board's Rules and Regulations confer on "parties" in formal Board proceedings.

The virtual identity of the rights granted and the language employed in specifying and granting them which appear both in the Board's Rules and in Section 10(l) argues strongly for the proposition that the same legal status of "party" was created and described in each. There appears to be no logical or rational basis for doubting that the use of essentially the same words by the Board and by Congress to confer the same rights of participation on charging parties did achieve, and was intended to achieve, the same legal status.

Therefore, by analogy, the right to seek judicial review from adverse district court decisions in 10(l) cases must have been intended by Congress just as the right to seek such review from adverse administrative rulings was intended.

The force of this analogy was recognized by the Ninth

Circuit in *Retail Clerk Union Local 137, supra,* where at footnote 4, that Court found merit to the contention that just as the Board cannot absolutely control the administrative consideration of cases once the General Counsel has "embarked upon the judicial process," similarly the Board may not control the courts' consideration of cases under Section 10(l) once the filing of the Board's petition for an injunction has conferred jurisdiction on the courts. In both instances the nature of the rights conferred on charging parties give them an independent role in pursuit of the success either of the Board's complaint or its petition under Section 10(l).

(3) Congressional Intent As Revealed by the Legislative History of Section 10(l).

The debates preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the degree to which charging parties before the Board should be accorded the rights of parties to full participation in, and independent access to, the district courts in cases where unions engage in unlawful secondary and organizational picketing.

An analysis of those debates reveals that in Section 10(l) Congress effected a compromise; while it limited charging parties' rights independently to initiate injunction proceedings in the courts, at the same time it sought to guarantee to charging parties the right of full participation in such proceedings once they were initiated by the Board.

The essential conflict which Congress was required to resolve was between the interest of private parties to the speediest and most direct remedy against the devastating effects of illegal boycotts and strikes, and the opposing policy of the Norris-LaGuardia Act to limit the jurisdic-

tion of the district courts to issue injunctions in labor disputes. The former interest required expeditious access to the courts' injunctive processes, the latter policy offered protection against a system whereby private parties could create a body of law forged by courts from theories urged by private parties independently of or in conflict with these urged and developed by the Board.

By way of resolving these conflicting values the House bill elected to permit private parties to move independently and unilaterally for injunctive relief:

> . . . The House bill [H. R. 3020], in section 12, provided for injunctions at the request of private persons, rather than by the Board, in [cases under Section 10(l)]. *House Conference Report* No. 510, Leg. Hist. 561.

This provision was not adopted since it would have constituted a virtual repeal of Norris-LaGuardia. However, similar proposals were made in the Senate, evidencing the trangible support which existed for direct private injunctive relief.

Throughout the Senatorial debates on the Taft-Hartley amendments, one of the most serious and recurring disputes centered on the so-called Ball amendment. Senator Ball sought to convince his colleagues that private parties should be permitted to seek court injunctions whenever they were individually aggrieved by secondary boycotts and other unlawful picketing, and without prior recourse to the Board. It was argued that this was the best method for avoiding potential harm (Leg. Hist. 561-562, 1057-1058, 1347-70). As contended by a supporter of this amendment, Senator Donnell,

> "[An injured party] should be entitled to engage his own attorney, go into a court which he selects, and direct the conduct of his litigation." (Leg. His. 1353.)

In opposition to this view other Senators argued that the Ball amendment would essentially repeal the Norris-LaGuardia Act in that private parties could forum-shop and institute injunction actions at their own discretion. Some of these opponents of the amendment argued further that the Act should afford no injunctive relief at all; all agreed, however, that even should some form of injunctive relief be provided, private parties should be required to proceed first before the Board rather than themselves initiate suits directly in the district courts.

Ultimately the Ball amendment was defeated for the same reasons which prevented the adoption of the similar provision in the House bill; while Congress was sympathetic to the needs of private parties for the protection afforded by injunctive relief, it was unprepared to permit them to initiate such suits independently and at will (Leg. Hist. 1057-8, 1149, 1347-70, 1544).

Section 10(l), as ultimately enacted, predictably represented a compromise. (1) In order to provide a meaningful remedy for employers faced with injurious unlawful picketing, mandatory injunctive relief was afforded. (2) However, in order to avoid a situation where employers could forum-shop and achieve an independent developement of the law through their own selection of a forum and of theories of violation and relief, the right to initiate injunction suits was limited to the Board. (3) In order to guarantee private parties the right to full participation in court proceedings stemming from unlawful strikes and picketing, *after* the Board initiates the action, Section 10(l) was drafted expressly to confer on charging parties rights associated only with full "party" status. (4) And in order to eliminate the possibility that Norris-LaGuardia might be interpreted to impose a limitation either on the Board's right to institute such injunction proceedings or on charg-

ing parties' rights thereafter to fully pursue their interests in those proceedings, Congress enacted Section 10(h) providing:

> "When granting appropriate temporary relief or a restraining order, . . . as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115) [Norris-LaGuardia Act]."

Accordingly, a review of the legislative history of Section 10(l) reveals Congress' purpose to afford private parties needed injunctive relief; to preserve the effect of Norris-LaGuardia only to the extent that the right to initiate injunction actions was limited to the Board, thus depriving private parties of the opportunity of engaging in those abuses which gave rise to Norris-LaGuardia; but otherwise in Section 10(h) to eliminate the operation of Norris-LaGuardia from proceedings arising under Section 10(l).

Thus, the sole limitation placed by Congress upon private parties' rights to participate in the district court injunction proceedings stemming from their filing of charges with the Board consisted only of their inability to institute such suits and, by implication, their inability to alter the theories, facts, or nature of relief sought by the Board.

Consequently, when the Board does initiate an injunction action, and charging parties thereafter seek the success of the Board's petition, whether in the District Court or in appellate courts, charging parties thereby exercise rights which the legislative history of the Act demonstrates that Congress intended them to possess.

(4) The Norris-LaGuardia Act is Irrelevant to the Exercise of Appellate Rights Under Section 10(l).

The Tenth Circuit's dismissal of Sears' appeal in the instant case was predicated, as noted earlier, on the previously discussed failure of Congress to specify charging parties' right to appeal and on the purported operation of Norris-LaGuardia. The latter Act, in § 107, provides that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . ." with certain exceptions not involved here.

While recognizing that Section 10(l) of the Labor Act constitutes an exception to Norris-LaGuardia insofar as it permits *the Board* to institute suits for injunctive relief, the court below held that an appeal by charging parties of a denial of injunctive relief is barred; such an appeal, held the court, is analogous to the institution of a petition for an injunction, an act which may not be done by private parties. In so holding, the Tenth Circuit rejected petitioner's arguments (1) that an appeal is a continuation of a suit already instituted and not a new cause, as was stated by this Court in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137; (2) that charging parties may *support* the Board's petitions for injunctive relief, so long as they rely solely on the facts, theories, and arguments of the Board, without such support constituting initiation of a cause; (3) that Norris-LaGuardia constitutes a bar only to the institution of petitions for injunctive relief by private parties, not to their support of petitions already filed by the Board; and (4) in any case Section 10(h) of the Labor Act expressly exempts all proceedings under Section 10, including 10(l), therefore, from the operation of Norris-LaGuardia.

The application by the court below of Norris-LaGuardia presupposes that an appeal is a separate action from the

cause appealed from, a demonstrably incorrect assumption. By its express terms, Norris-LaGuardia, when applicable, deprives courts of jurisdiction. It is unquestioned that when the Board filed its petition for an injunction in this case it conferred jurisdiction upon the district court. In *Marbury* v. *Madison*, Chief Justice Marshall stated (at page 175):

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause."

Thus, the charging party's appeal did not constitute a new cause or the initiation of a cause, but merely continued a cause in which jurisdiction had already been conferred by the filing of the Board's petition.

The same conclusion,—*i.e.*, the inapplicability of Norris-LaGuardia to the existence of appellate rights under Section 10(l),—follows from alternative lines of reasoning.

Congress carved out an exception to Norris-LaGuardia in situations where the Board *initiates* petitions for injunctive relief. Therefore, when such petitions have been filed *by the Board*, the limitation upon courts' jurisdiction is lifted. Thereafter, courts have jurisdiction to adjudicate those cases in the same manner as any non-labor injunction suit, and the parties to the proceeding have the same rights as do parties in any other such action. The requirement that the suit be *initiated* by the Board carries with it the obvious implication that the courts shall consider only those theories, allegations, and requests for relief which are incorporated in the Board's petition; if private parties were permitted to urge new or expanded or different arguments or theories, then they would themselves be *initiating* a different injunction action from the Board, in contravention of Norris-LaGuardia. But when private parties merely seek to *support precisely* those positions which are

contained in the Board's petition they are not initiating anything and do not contravene the requirements of the Norris-LaGuardia Act. Thus, the distinction between *initiate* and *support* is critical to the question of charging parties' rights in the judicial consideration of cases under Section 10(l).

This argument was recognized and adopted by the Ninth Circuit in *Retail Clerks Union, Local 137* v. *Food Employers Council, supra.*

In *Retail Clerks,* pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a district court for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the district court and sought its approval by that court in lieu of an injunction. The charging parties objected to the approval of the Stipulation and urged the court to grant injunctive relief pursuant to the Regional Director's pending petition.

The district court granted the injunction as requested by the charging parties and over the objection of the Board's Regional Director. The union and the Regional Director then appealed the court's order (in the face, of course, of Congress' silence in Section 10(l) on their right to do so).

In his appeal the Regional Director contended that since Norris-LaGuardia permitted only the Board to seek injunctive relief, and since the Board declined to do so in that case notwithstanding the pendancy of its petition, therefore the district court's action constituted the granting of an injunction of the behest of a private party in violation of Norris-LaGuardia.

On appeal the Ninth Circuit affirmed the district court's decision and order, dismissing the Regional Director's appellate contention as lacking merit.

With respect to the Regional Director's argument, the court held that Norris-LaGuardia and the policy of the Act require only that the Regional Director must *initiate* suits for injunctive relief pursuant to the *mandatory* duty imposed upon him by Section 10(l) whenever he has reasonable cause to believe that one of the sections enumerated therein has been violated. Once he has done so, the limitations of Norris-LaGuardia and the policy of the Act cease to inhibit the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. Accordingly, the Ninth Circuit held that district courts may grant injunctions at the urging of charging parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

In the instant case, the effort of Sears to appeal the adverse decision of the district court was in aid of—or supported—the Regional Director's "original petition for injunctive relief requested by the Regional Director." Hence Sears' efforts constituted a legitimate exercise of rights in aid of a legally permissible objective.

In sum, the considered opinion of the Ninth Circuit in *Retail Clerks* constitutes precedent for the propositions that charging parties in cases under Section 10(l) have the right

to be heard in the district court to urge the granting of injunctive relief, in support of and pursuant to the Regional Director's pending petition, *whether or not the Regional Director continues to seek such relief.* Similarly, they have standing to object to his refusal to persist in his efforts to secure such relief or to his decision to seek lesser relief.[5] And the combination of these rights should be understood to confer on charging parties the status of full party-litigants in the district court; those are rights which are commonly exercised only by "parties," and there are no greater rights which could meaningfully be exercised within the statutory scheme of the Act.

It further follows that if charging parties have the right to support the Board's petition for an injunction in the district courts despite the Board's objections, then logic compels that they should have a similar right to support that petition in the appellate courts when the Board declines to do so.

Additional support for the conclusions reached by the Ninth Circuit in *Retail Clerks* derives from the language of the National Labor Relations Act which demonstrates that charging parties' independent support of the Board's petition is not barred by Norris-LaGuardia. Section 10(l) provides that:

> "Upon the filing of any such petition the District Court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, *notwithstanding any other provision of law.*" (Emphasis added.)

It is significant to note that the statute does *not* state that courts are limited to the granting of relief urged by the Board. On the contrary, once the Board has conferred ju-

5. Further support for the *right* of charging parties to move independently to secure the protection of their private rights is found in *Leeds and Northrup* v. *NLRB*, 357 F. 2d 627 (CA 3, 1966).

risdiction on the courts by filing its petition then the courts are expressly made free to grant appropriate relief pursuant to that petition *without limitation as to the identity of the party urging such relief*. This point was recognized by the court in *Retail Clerks:*

> "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined *whenever a district court has been shown reasonable cause* to believe in their existence and finds that the threatened harm or disruption can be avoided through an injunction." (Emphasis added.)

Thus the court required only that reasonable cause be shown, *not* that it may be shown only by the Board. When the Board argued to the Ninth Circuit that *only* the Board should be permitted to urge as well as to petition for the granting of injunctive relief, and that for private parties to so urge would violate Norris-LaGuardia just as much as if they had filed the petition in the first instance, the court summarily rejected the argument. According to the court, Congress itself determined that private parties should have that supportive right. The court held that:

> "It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of Congress."

Accordingly, the statute itself, together with the principal judicial authority which has interpreted it, expressly provides that private charging parties have standing independently to urge in *support* of the Board's petition, injunctive relief in cases under Section 10(l). Moreover, the statute adds a legislative exclamation point to the granting of this right and status by providing explicitly that they exist "notwithstanding any other provision of law", such as Norris-LaGuardia. It would constitute a mockery of our judicial system to conclude that Congress and the courts

conferred a specific right and status upon charging parties in the district court while at the same time denying them the right to appeal the district court's erroneous refusal to permit the exercise of the right and status so conferred. It seems clear, therefore, that the Norris-LaGuardia Act neither prohibits private charging parties from urging such injunctive relief nor from appealing the erroneous and prejudicial failure of a court to grant it, all in *support* of the Board's previously filed petition.

Finally, to the extent that any doubt concerning the irrelevance of Norris-LaGuardia to such situations could continue to exist, Congress enacted Section 10(h), which declared specifically that in litigation arising under Section 10 of the Act "the jurisdiction of courts sitting in equity shall not be limited by [Norris-LaGuardia.] It should be noted, once again, that Section 10(h) does *not* condition the inapplicability of Norris-LaGuardia to those situations where only the Board urges the success of its petition; rather, the language is unqualified in this respect. Whenever jurisdiction is conferred upon a district court through the filing of the Board's petition, the language of the exemption from Norris-LaGuardia is *absolute* with respect to the court's authority to grant relief pursuant to that petition at the behest of *any* party. *And the elimination of the prohibitions of Norris-LaGuardia further enable such courts to treat the litigants as if the suit were an ordinary equitable action, in which the nature and extent of the interests of the charging parties herein would render them "parties" to the litigation and give them standing to seek review.*

For all of the reasons stated above it is clear not only that the Norris-LaGuardia Act does not bar the right of private charging parties to urge the success of the Board's petition for injunctive relief under Section 10(l), but it is also clear that an analysis of the statutory language of the National Labor Relations Act and of the principal judicial

authority interpreting it reveals a legislative and judicial purpose to permit such conduct and, necessarily therefore, further to permit an appeal by an aggrieved party whose sole purpose is to support the Board's petition by seeking the reversal of an erroneous order dismissing it. The court below, in dismissing Sears' appeal, misconceived the thrust and relevance and the logic of the *Retail Clerks* decision.

(a) In order to convey the impression that no inconsistency exists between the decision of the Tenth Circuit being reviewed here and the decision of the Ninth Circuit in *Retail Clerks,* the Tenth Circuit characterized the holding in *Retail Clerks* as being limited only to rights existing in injunction proceedings *in the district courts.* But this distinction is unsound since appellate review is an extension of the same cause litigated in the district court, rather than a new and separate action. *Marbury* v. *Madison, supra.* Moreover, the Tenth Circuit's decision itself was predicated upon the court's view that Sears lacked standing to appeal since Section 10(l) did not confer upon charging parties *in the district court* rights adequate to create a status entitling them to seek appellate review. Thus the rationale of the court below is inconsistent with its own attempted distinction of *Retail Clerks.*

(b) The Tenth Circuit's reliance on the Norris-LaGuardia Act to justify denying Sears' standing to appeal the district court's failure to grant a *temporary* injunction fails to explain how aggrieved charging parties may obtain a *permanent* injunction under Section 10(f). If Norris-LaGuardia bars courts from granting injunctive relief—except on direct application *by the Board*—then it would seem that this bar would apply to all such relief, whether temporary or permanent. Yet Section 10(f) of the National Labor Relations Act clearly permits charging parties to obtain permanent injunctive relief although the provisions of that Section contain no exemption from the operation

of Norris-LaGuardia. The Tenth Circuit's error consisted in its failure to give effect to Section 10(h) of the Act which removes the bar of Norris-LaGuardia in *all* proceedings under Section 10, including charging parties' appeal from both adverse final orders of the Board (10(f)) as well as adverse final orders of the district court 10(l)).

(c) Although the Tenth Circuit's decision made a brief reference to the distinction between "support" and "initiate" which formed the basis of the decision in *Retail Clerks,* it did not apply the consequences of that distinction to the facts before it. Moreover, its reference to and reliance upon *McLeod* v. *Business Machine & Office App. Mech. Conf. Board,* 300 F. 2d 237 (CA 2, 1962), suggests its failure to appreciate that distinction. In *McLeod* the charging party sought to introduce grounds for injunctive relief which were different than and in addition to those relied upon by the Regional Director in his petition in the district court. The decision of the Second Circuit was premised on the fact that the charging party there had, in effect, initiated an independent basis for injunctive relief which the Board had neither authorized, adopted nor approved. While the Tenth Circuit gave no evidence of awareness of the significant factual difference between *McLeod* and the instant case, the Ninth Circuit's decision in *Retail Clerks* was based upon such an awareness:

> "[*McLeod* is] distinguishable from the present facts where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, but merely supported the original petition for injunctive relief requested by the Regional Director."

(d) The scholarly and detailed analysis of the nature and extent of charging parties' rights under Section 10(l) which characterizes the decision in *Retail Clerks* led that court, unlike the court below, to consider the question in

terms of the policy of the Act and the requirements of equity. Thus that court noted, at footnote 2, that the same policy considerations which support the right of charging parties to a full and adequate hearing before the Board similarly support their right to such a hearing in the courts. But what if the Board elects not to seek such a hearing, as in the example provided by the instant case where the Board failed to appeal the district court's erroneous refusal to afford injunctive relief? The Ninth Circuit's answer, predicated upon the irrelevance of Norris-La-Guardia and upon its awareness that the Act also recognizes and protects charging parties' private rights, has controlling relevance here:

> "We find no inconsistency in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so." (footnote 2)

Under the circumstances of the instant case, where "the NLRB is either unable or unwilling" to appeal an erroneous denial of injunctive relief and in which the damage to the charging party which caused the injunction petition to be filed continues, there can be no sound and equitable basis for refusing to allow the charging party to appeal. This is true even if the charging party is not deemed to have "party" status in the court, but serves in the place of a party, the Regional Director, who declines to continue to represent and protect the charging parties' interests.

It is true that two recent decisions by dissimilar panels of the Ninth Circuit from that which decided *Retail Clerks* reflect some doubt on the current status of the law in that Circuit. On analysis, however, these decisions reveal defects which only serve to emphasize the superior merits of the reasoning and result of *Retail Clerks* itself. Thus, in

San Francisco-Oakland Newspaper Guild v. *Kennedy* (unreported order of May 20, 1968), the Ninth Circuit rescinded a prior order permitting successful charging parties to intervene in a Section 10(l) proceedings. This decision, apart from its apparent inconsistency with *Retail Clerks,* constituted a violation of the teaching of this Court in *UAW* v. *Scofield (Fafnir), supra.* In the second case, *Henderson* v. *International Union of Operating Engineers, Local 701* (No. 24285, decided December 11, 1969), the court concluded that the successful charging party lacked standing to constitute an "appellee" in the court of appeals and was related to the status of *amicus curiae.*

The holding in the latter case is rather difficult to understand or evaluate. Initially, at footnote 2, the court states:

> "Under [Section 10(l)], *any* person involved in the charge is entitled to appear in the district court by counsel and to present relevant testimony. If the order entered by the district court aggrieves *any* such party, it undoubtedly has the right to appeal. . . . " (Emphasis added).

Since the charging party is one of those persons involved in the charge (*e.g.,* a charge typically will allege the unlawful picketing of the charging party's premises), the charging party therefore "undoubtedly has the right to appeal." While this conclusion is consistent with *Retail Clerks,* and is required by the court's language, the court's conclusion is, without clarifying explanation, apparently to the contrary. Second, the court's relegation of the charging party to the status of *amicus* is inconsistent with *Scofield* and *Fafnir* whose very point was that charging parties are entitled to exercise a greater role than that of an *amicus* in the appellate consideration of their vital interests. Third, while the court made reference to the decision of the instant *Sears* case in the Tenth Circuit and noted the latter court's reliance upon Norris-LaGuardia, the Ninth Cir-

cuit itself neither relied upon nor specifically approved that result, nor did it comment on the conflict between that result and its own contrary conclusion regarding the relevance of Norris-LaGuardia in the *Retail Clerks* case. Finally, the Ninth Circuit did not reverse or even limit its holding in *Retail Clerks*, and did not attempt further to explain the practical or theoretical basis for its holding.

A possible explanation for both of these post-*Retail Clerks* holdings consists in the fact that in both cases the charging parties had been successful in obtaining injunctive relief in the district court, in both cases the agents of the Board continued to advocate and represent the interests of the charging party in the court of appeals (unlike the *Retail Clerks* case), and in both cases the charging parties were permitted to file briefs in the appellate court. Thus the court may have felt that the label to be attached to the charging parties in the appellate court was irrelevant since there was nothing more they could have achieved as "parties."

Such a rationale is completely inappropriate and inadequate in the present case, however, where the charging party was unsuccessful in the district court, where the Board refused to continue to advocate and represent the interests of the charging party in the appellate court, and where there was no pending proceeding in which the charging party could even file a brief. In such cases, absent a right to seek review directly as an aggrieved party, the charging parties would find themselves with interests to protect but no judicial vehicle in which to protect them; they would find themselves with rights but without remedies.[6]

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6. Other than the instant case, the only known instance under Section 10(1) in which a charging party sought appellate review as an *appellant*, is the *Samoff* case in the Third Circuit, in which the charging parties were Terminal Freight Handling Co. and Terminal Freight Cooperative Association, *amici* herein. Unfor-

This is precisely the position in which the decision of the court below places Sears due to its incorrect reliance on Norris-LaGuardia and its erroneous refusal to apply the wisdom and learning of *Scofield-Fafnir* and *Retail Clerks*.[7]

C. THE DEMANDS OF DUE PROCESS OF LAW REQUIRE GRANTING CHARGING PARTIES THE RIGHT TO JUDICIAL REVIEW IN CASES ARISING UNDER SECTION 10(l).

This Court has consistently followed the principle that federal statutes should be construed and applied, whenever possible without doing violence to the words actually used, in such a manner as "will bring them into harmony with the Constitution". The *Japanese Immigrant Case*, 189 U. S. 86, 101; and see *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 107-108; *Greene* v. *McElroy*, 360 U. S. 474, 507-508. In that way serious constitutional problems that might adhere to a contrary construction are avoided. Moreover, as noted in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49: "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate, and where applicable, permeates every valid enactment of that body".

Thus the constitutional requirements of procedural fairness and due process must be deemed to permeate the judicial proceedings envisaged by Section 10(l). There is no language in that section that contradicts those requirements. The "manifest purpose in requiring a hearing", once the appellate jurisdiction has been invoked

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tunately, in its decision of December 18, 1969 the court dismissed the appeal as being moot and did not reach the question of the right of charging parties to seek such review (*Samoff* v. *I.A.M. Local 1*, Nos. 17,907 and 17,910).

7. The view of the Ninth Circuit in *Retail Clerks* that Norris-LaGuardia is inapplicable to all proceedings under Section 10 finds support in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964).

under Section 10(l), "is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182; see also *Carter* v. *Kubler*, 320 U. S. 243, 247, construing a provision of the Bankruptcy Act as necessarily guaranteeing "a fair and full hearing".

An elemental ingredient of procedural due process is the right to be heard at all critical stages where one's interests could be protected. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353; *Lane* v. *Brown*, 372 U. S. 477. It is that right which is involved in Sears' effort to review an erroneous and prejudicial decision in the district court. And it is that right which petitioner believes is incorporated into the provisions of Section 10(l) by virtue of the foregoing principle of statutory construction, a principle grounded upon the presumption that, absent contrary words, Congress intended to make available all rights essential to a due process hearing in the courts of appeals.

Analysis of the decision of the court below reveals its effect of denying charging parties the right to a full and fair hearing on the deprivation of its essential interests,—indeed it denies the *right* to any hearing at all at the appellate level.

Pursuant to the decision of the court below, the protection of charging parties' vested rights under Section 10(l) to be present by counsel, to examine and cross-examine witnesses, to introduce relevant documentary matter, to object to irrelevant or prejudicial matter, to argue orally, and to file briefs, depends solely upon the Board's willingness to seek judicial review. This applies both to a district court's denial to charging parties of rights expressly conferred *upon them* in Section 10(l), as well as to the erroneous denial by the district court of the relief to which *they* are entitled. Moreover, the Board's decision

as to whether or not to appeal adverse and erroneous court decisions often depends, as this Court noted in *Scofield*, on "tactical" or "budgetary" considerations unrelated to the merits. The Tenth Circuit, therefore, would render the enforcement and protection of charging parties' vested and guaranteed rights subject to fortuitous and extraneous considerations wholly beyond their power to control or affect. Such a denial of the *right* of appellate review neither is required by the Act nor is otherwise sanctioned by this Court:

> "The supremacy of law demands that there be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (*St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 84, (concurring opinion of Mr. Justice Brandeis)).

In obedience to this principle this Court has recognized the right of interested parties to seek review in this Court in cases arising under the National Labor Relations Act, and in the absence of specific statutory authority permitting such review, where the Board refuses to do so. *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335; *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492. These decisions evidence this Court's conviction that the due process right to a full hearing includes the right of appellate review.

Moreover, to the extent that due process of law requires that an opportunity to exercise or protect granted rights be afforded at all levels of the cause in which they are conferred, that opportunity has been denied Sears in this case. *Ashbacker* v. *F. C. C.*, *supra*. The court below erred in assuming that the district court proceeding was a separate cause from the court of appeals proceeding seeking to review its decision. Thus the Tenth Circuit conceded the existence of exercisable rights on behalf of charging parties

in the district court, which rights disappeared upon the rendering of the latter court's decision.

The error in such a view was recognized as long ago as this Court's decision in *Marbury* v. *Madison*, *supra*, in which, as previously noted, Chief Justice Marshall stated:

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause."

The court below would foreclose all opportunity to "revise" and "correct" whenever the Board, for any undisclosed reason of its own, determines not to seek to do so.

Further, the nature and extent of the rights granted to and exercised by Sears in the district court confers upon Sears, without reference to the foregoing arguments, a right to seek review.

Pursuant to the second proviso of Section 10(l), Sears was entitled to and did receive notice of the filing of the petition for injunction in the district court, and was entitled to and was accorded the right to "appear by counsel and present any relevant testimony."

Having taken advantage of these rights granted by law, Sears is further entitled, as a matter of right, to seek review.

> "Where a statute gives an absolute right to be heard, which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal." 4 MOORE, FEDERAL PRACTICES 104 (2d ed. 1963).

Under analogous Acts of Congress such right of appeal is present. For example, under Section 206 of the Chandler Act, 11 U. S. C. § 606, relating to bankruptcy proceedings, the debtor, the indenture trustees, and any creditor or stockholder of the debtor is granted the right "to be heard on all matters arising in a proceeding under this chapter". Although the persons mentioned are not formal

parties, the quoted language has been construed as making these persons "quasi-intervenors" and thus authorizing appeals by them. *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005 (C. A. 3, 1941); accord, *Gleeson* v. *Carr*, 219 F. 2d 64, 67 (C. A. 9, 1955), cert. den, 350 U. S. 827 (1955); *Rogers* v. *Consolidated Rock Prods. Co.*, 114 F. 2d 108, 110 (C. A. 9, 1940), aff'd on other grounds, 312 U. S. 512 (1940); see *Young* v. *Higbee Co.*, 324 U. S. 204, 210.

Thus, having been accorded by Section 10(l) at the very least the status of a "quasi-intervenor" or a "statutory intervenor" in the district court, Sears possesses "a concomitant right of appeal" such that its denial by the court below infringed Sears' right to due process.

It should be added, in connection with the matter of intervention, that apart from Sears' contended status as a "party" in the district court, Sears also moved the court below in the alternative to grant its motion to intervene in order to prosecute an appeal from the district court's decision.[8] In denying this motion the court below continued the process of disenfranchising charging parties in their efforts to protect their vested rights to injunctive relief under Section 10(l). A corollary effect of that dismissal was to ignore again this Court's teachings in *Scofield* and *Fafnir* that technical rules must be subordinated to the right of charging parties to participate as parties in the judicial disposition of their vital interests. *Wolpe* v. *Poretsky*, 144 F. 2d 505 (C. A. 4, 1944), cert. den. 323 U. S. 777; *Smartt* v. *Coca Cola Bottling Corp.*, 337 F. 2d 950 (C. A. 6, 1964), cert. den, 380 U. S. 934; *McKenna* v. *Pan Am Petroleum Corp.*, 303 F. 2d 778 (C. A. 5, 1962); *N L R B* v. *Acme Industrial Company*, 385 U. S. 432 (where this Court granted intervention rights on motion to a party who had not previously participated in the litigation of the case.)

8. The Motion to Intervene was made and supported in Sears' Response to the Motions of the Union and the Board to dismiss its appeal. [App., p. 69.]

Should this Court determine that charging parties do not have standing to seek review in cases under Section 10(l) absent a motion to intervene, then it is urged in the interest of affording due process to such aggrieved charging parties that, in the absence of an appeal by any other party, charging parties may intervene solely in order to prosecute such an appeal, as Sears unsuccessfully sought to do in the instant case.

CONCLUSION.

In reliance upon the arguments and authorities cited above, it is respectfully urged that the judgment below denying charging parties the independent right to seek appellate review from adverse district court decisions in cases arising under Section 10(l) of the National Labor Relations Act be reversed.

Respectfully submitted,

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